

COVINGTON & BURLING

1201 PENNSYLVANIA AVENUE NW
WASHINGTON, DC 20004-2401
TEL 202.662.6000
FAX 202.662.6291
WWW.COV.COM

WASHINGTON
NEW YORK
LONDON
BRUSSELS
SAN FRANCISCO

December 20, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

**Re: Applications of America Online, Inc. and Time Warner Inc. for
Transfers of Control (CS Docket No 00-30)
Ex Parte Communication**

Dear Ms. Salas:

On December 19, several representatives of the IM Competitors met with Commissioner Ness and her staff, along with representatives from AOL and from the hearing impaired community, to discuss a number of questions concerning interoperability of Instant Messaging ("IM") in the context of the above-captioned merger. An attendance list of Commission and IM Competitor participants is attached. During the meeting we made the following points:

- AOL has steadfastly refused to participate in the IETF process. Since announcing that they were going to "fast track" interoperability and were committed to the IETF standard-setting process in June of 1999, AOL has submitted exactly *one* document to the IETF in the past 18 months.
- Though AOL claims that customers can always download multiple IM providers, users of wireless devices – the fastest growing part of the Internet – have no choice and can only change IM providers by changing their wireless service provider.
- AOL's market share as measured by the only metric that matters – minutes of use – is dominant and, despite concerted effort by IM Competitors, is unwavering. Counting persons who have downloaded and used a service once in a month (active or unique users) is not a meaningful measurement tool.
- The market for IM is likely to tip in the near future unless interoperability is adopted. The combination of AOL's dominant IM platform with the content and

cable facilities of Time Warner will tip the narrowband IM market and enable AOL/Time Warner to leverage this market share into the broadband market. For these reasons, the concerns on IM are specific to the merger.

- As Rick Warren-Boulton explained, AOL's blocking of interoperability inconveniences AOL's customers, cheapens the value of its network, and costs money. So why is AOL doing it? Because non-interoperability hurts competitors' consumers as well, and AOL has calculated that because of the network effects inherent in IM, AOL will win those customers.

We also discussed why conditioning approval of the AOL/Time Warner merger on targeted requirements that seek to facilitate IM interoperability falls squarely within the Commission's jurisdiction and why, absent appropriate interoperability conditions, the merger is *not* in the public interest. As the Commission has explicitly recognized, it has broad authority to act by imposing conditions in the context of a merger.¹ Before approving a proposed merger, the Commission is required to ensure that it is in the public interest. The public interest standard "is a flexible one that encompasses the 'broad aims of the Communications Act,'" including "'accelerat[ing] rapidly private sector deployment of advanced telecommunications and information technologies and services.'"² It is also in the public interest to "accelerate rapidly private sector deployment of" IM, which is an information technology or service. And rapid deployment of IM services to everyone can only be achieved once there is true server-to-server interoperability.

Sections 1 and 2 of the Communications Act give the Commission ample authority to ensure the availability of IM services to everyone. Section 1 gives the Commission broad and direct authority to address new technologies as they evolve by requiring it to "make available, so far as possible, to all the people of the United States, . . . a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges."³ Section 2 of the Act also gives the Commission authority to address emerging technologies because it explains that the Act "appl[ies] to all interstate and foreign communication by wire or radio . . . which originates and/or is received within the United States,

¹ See *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd. 18025, 18032 (1998) ("MCI/WorldCom Order") ("When necessary, the Commission may attach conditions to the approval of a transfer of licenses in order to ensure that the public interest is served by the transaction.").

² *Id.* at 18030-31 (quoting *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd. 19985, 19987 (1997), and H. Rep. No. 104-458, at 1 (1996)).

³ 47 U.S.C. § 151.

COVINGTON & BURLING

Ms. Magalie Roman Salas
December 20, 2000
Page 3

and to all persons engaged within the United States in such communication.”⁴ IM meets this definition: it is an interstate communication service that can only be made truly available in an effective way to all Americans if AOL permits the customers of other IM providers to reach its customers.

When the Commission approved the merger of AT&T and MediaOne just a few months ago, it recognized the importance of “broadband applications and content hav[ing] the ability to interface with the full range of competing broadband technologies.”⁵ It is likewise crucial in the technological marketplace of today and tomorrow that IM applications be able to interface with the full range of competing IM technologies. Failure to take the modest step of requiring AOL to make its IM services interoperable is “a serious threat to the openness, diversity, and innovation of the Internet and the development of competition in the provision of [IM] services.”⁶

Taking the modest step of requiring AOL to enable customers of third party IM providers to communicate with AOL’s IM customers will have only a narrow impact on future FCC proceedings. The Commission here faces unique circumstances brought about by AOL’s intractable position and closed network, and it can impose conditions in the unique circumstances of this merger without setting a precedent for regulation of the Internet.

For these reasons, the Commission has jurisdiction to attach to its approval of the AOL/Time Warner merger a targeted condition requiring AOL to allow other IM providers to use its published interoperability protocol.

Sincerely,

Gerard J. Waldron

Attachment

⁴ 47 U.S.C. § 152.

⁵ *Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, Memorandum Opinion and Order, 15 FCC Rcd. 9816, ¶ 124 (2000) (“AT&T/MediaOne Order”). Although the Commission declined to impose a broadband access condition on the AT&T/MediaOne merger, it expressed its serious concern that the trend toward consolidation “in the broadband services industry has the potential to threaten the openness, competition, and innovation of the Internet and the diversity of media voices that are available to Americans.” *Id.* at ¶ 127.

⁶ *Id.* at 124.

COVINGTON & BURLING

Ms. Magalie Roman Salas

December 20, 2000

Page 4

cc: Commissioner Susan Ness
Mr. Mark Schneider, Senior Legal Advisor to Commissioner Ness
Mr. David Goodfriend, Legal Advisor to Commissioner Ness
Ms. Susan Eid, Legal Advisor to Commissioner Powell
International Transcription Services, Inc.

List of Meeting Attendees

On behalf of the FCC:

Commissioner Susan Ness

Mr. Mark Schneider, Senior Legal Advisor to Commissioner Ness

Mr. David Goodfriend, Legal Advisor to Commissioner Ness

Ms. Susan Eid, Legal Advisor to Commissioner Powell

On behalf of IM Competitors:

Mr. Jon Englund, Excite@Home

Mr. Rick Warren-Boulton, Micra

Mr. David Lawson, Sidley & Austin, for AT&T

Mr. Yusef Mehdi, MSN

Mr. Bob Visse, MSN

Mr. Alex Diamandis, Odigo

Mr. Gerard J. Waldron, Covington & Burling, for Microsoft